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In the Supreme Court of the United States

No. 353

OCTOBER TERM, 1962.

TERESA GRISANTI, etc.,
Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, et al.,
Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

JURISDICTIONAL STATEMENT.

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APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

JURISDICTIONAL STATEMENT.

Appellant appeals from the judgments of the Supreme Court of Ohio rendered in this case on May 9, 1962 wherein it dismissed the appeal as of right filed therein from the judgment of the Court of Appeals of Cuyahoga County, Ohio entered on March 12, 1962 and also on May 9, 1962 overruled the plaintiff-appellant's motion for an order directing the Court of Appeals of Cuyahoga County to certify its record to the Supreme Court of Ohio. Judges Taft and O'Neill dissented from the judgment of dismissal. An application for rehearing of the orders of the Supreme Court was denied by it on June 13, 1962 and on June 21, 1962, notice of appeal to the United States Supreme Court with proof of service was duly filed in the Supreme Court of Ohio.

This statement is submitted for the purpose of showing that the Supreme Court of the United States has jurisdiction to hear this appeal and that a substantial question is presented.

OPINIONS BELOW.

The opinion of the Court of Common Pleas of Cuyahoga County is reported in 18 O. O. (2d) 143, but is set out herein as Appendix "A." The opinion of the Court of Appeals of Cuyahoga County, Ohio is reported in 89 Ohio Law Abstract, page 1 and is annexed hereto as Appendix "C." The Supreme Court of Ohio wrote no opinion. (For convenience, the Appendix hereto has been printed under separate cover.)

JURISDICTION.

(i) This action was brought at common law by petition for injunction and other relief in the Court of Common Pleas of Cuyahoga County, Ohio.

(ii) A copy of the judgment of the Common Pleas Court entered November 27, 1961 is attached hereto as Appendix "B." The date of the judgment of the Court of Appeals of Cuyahoga County, Ohio, Eighth District, here sought to be reviewed is March 12, 1962. A copy of the entry of that Court is attached hereto as Appendix "D."

On March 29, 1962, appellant filed her Notice of Appeal to the Supreme Court of Ohio as of right on constitutional questions and also on condition that a motion to certify the record be allowed. The May 9, 1962 Journal Entry of the Supreme Court of Ohio dismissing the appeal as of right and overruling the motion to certify the record is attached hereto as Appendix "E" together with its Journal Entry of June 13, 1962 denying the application for rehearing. On June 21, 1962, Notice of Appeal to the United States Supreme Court was filed in the Supreme Court of Ohio.

(iii) Jurisdiction is conferred upon this Honorable Court by virtue of the terms of Section 1257 (2) of the

Judicial Code, 28 U. S. C. Section 1257 (2) which provides as follows:

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

'(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.' "

(iv) The cases believed to sustain the jurisdiction of the Supreme Court of the United States to hear this case are:

(A) Appellant has been denied due process of law guaranteed by the Fourteenth Amendment of the Constitution of the United States by:

(a) failure to give notice prior to the enactment by the City of Cleveland of an ordinance to allegedly establish its right to condemn her property by eminent domain. *Lambert vs. California*, 355 U. S. 225; *Mullane vs. Central Hanover Trust Company*, 339 U. S. 306; *Covey vs. Town of Somers*, 351 U. S. 141; *Walker vs. Hutchinson City*, 352 U. S. 112; *Scott vs. McNeal*, 154 U. S. Page 34.

(b) Where, by the finding of facts by a state court, a federal right has been denied as a result of a finding shown by the record to be without evidence to support it. *Fiske vs. Kansas*, 274 U. S. 380, 385; *Northern Pacific Railway vs. North Dakota*, 236 U. S. 585, 593; *Aetna Life Insurance Company vs. Dunken*, 266 U. S. 389, 394.

(c) In determining that the expropriation of plaintiff's private property was for a public use and not for a private use. *Cincinnati vs. Vester*, 281 U. S. 439; *Sears vs. City of Akron*, 246 U. S. 242, 251.

(v) This appeal draws in question the validity of Ordinance No. 2428-60 of the City of Cleveland which is annexed hereto as Appendix "F," and the applicability of 42 U. S. C. § 1460(c) Public Law 86-372, Title 413, 73 Stat. 675, 677, as amended Sept. 23, 1959 and as in effect at the times herein concerned (Appendix H).

QUESTIONS PRESENTED BY THIS APPEAL.

(1) May the adoption of an urban renewal plan by a municipality be the means of depriving a landowner in the Northwest Territory of the right of judicial proceedings according to the course of the common law and deprive him of his property,—but by the judgment of his peers or the law of the land—where the public exigencies do not make it necessary for the common preservation?

The foregoing rights having been granted to the plaintiff in the Northwest Ordinance, captioned the "Ordinance of 1787" adopted by Congress July 13, 1787 and having never been altered by common consent between the original states and the people in the states in the Northwest Territory, a copy of which Ordinance is attached hereto as Appendix "G."

(2) In an injunction filed by a taxpayer landowner to enjoin the alleged illegal appropriation of her property as part of a slum clearance project, is evidence admissible in support of her averments that:

> (a) The area in question is not an area blighted, deteriorated or deteriorating, nor detrimental to the public health, safety or welfare and any such finding or determination by the defendants was arbitrary, capricious, contrary to law, and constituted an abuse of discretion and of the powers of the defendants.

(b) That the threatened taking of plaintiff's property by the exercise of eminent domain was for a private and not for a public use.

(3) May a municipality legally appropriate property of a landowner with the use of federal funds as part of an urban renewal project where approximately 80% of the land in the project area is vacant and only a small portion of the structures are sub-standard and the so-called urban renewal area is not predominantly residential in character?

(4) Is property of a landowner being taken for a public purpose where no domination thereof is exercised by the condemning municipality but actually a contract to sell the landowner's property is entered into with a private corporation for profit before the land is actually owned by the municipality?

(5) Are a landowner's due process rights violated by a final determination by a municipality that her land may be appropriated by the exercise of eminent domain where the determination, which is a necessary predicate to attempting such appropriation, is made, that the area in which her land is located is blighted, deteriorated or deteriorating, without affording the landowner any opportunity to present any evidence thereon, to examine any witnesses with reference thereto and without giving the landowner any prior notice whatsoever of a hearing at which such determination was made?

(6) May a municipality legally enter into a loan and capital grant contract with the United States of America to procure and use grants and funds of the United States for the appropriation of a landowner's property and to be used in an alleged urban renewal development where the project area is not predominantly residential in character?

STATUTES AND CONSTITUTIONAL PROVISIONS.

This case involves the Fourteenth Amendment of the Constitution of the United States, Section 1, the pertinent portion of which reads as follows:

> "* * * No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law; nor deny to any persons within its jurisdiction the equal protection of the laws."

It also involves the said Northwest Ordinance (Appendix "G"); that portion of the Fifth Amendment of the United States Constitution providing: "* * * nor shall private property be taken for public use without just compensation" and the Fourth Amendment which provides:

> "The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supporting by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

STATEMENT OF THE CASE.

1. THE FACTS.

The parties are referred to as they appeared in the trial court. This is an action in injunction commenced in the Cuyahoga County, Ohio, Common Pleas Court by the plaintiff individually and as a citizen and taxpayer of the City of Cleveland, Ohio. A request to bring this action had been previously rejected by the Director of Law of the City of Cleveland.

For a great number of years, plaintiff has resided in and been the owner of the real property described in her petition. This is located in the area which constitutes hereinafter described Erieview Project No. 1; it consists of a masonry commercial and residential structure at 1205 St. Clair Avenue, Cleveland, Ohio.

An appropriation action against plaintiff's property was filed in the Common Pleas Court of Cuyahoga County by the defendant, City of Cleveland.

It is contended that Erieview Project Area 1 is an area blighted, deteriorated or deteriorating as defined in Cleveland Ordinance 1.5102; that an ordinance and resolution to that effect were adopted by the defendant, City Council and the City Planning Commission and a plan for the renewal thereof was approved by those bodies. (Ordinance No. 2428-60 Appendix "E.")

This plan provided that the City of Cleveland should purchase (or appropriate, if necessary) and demolish every structure in this "so-called slum" area with a few exceptions. The land was then to be sold for private business uses. The area is generally bounded by Lakeland Freeway on the north, approximately East 14th Street on the East, Chester Avenue on the south and on the east by East 9th Street between Chester Avenue and Superior;

by a line about 200 feet west of East 9th Street between Superior and St. Clair Avenues; by 6th Street between St. Clair and Lakeside Avenues and by East 9th Street between Lakeside and Lakeland Boulevard.

Only thirty-four families live in the ninety acres embodied by this area. 429 separate businesses are located there. The "Plan" says that all are to go. Approximately 80% of the area is vacant land.

Plaintiff's action was one asking that defendants be temporarily and permanently enjoined and restrained from expending any public funds for the appropriation of the plaintiff's premises and any premises located in the said Erieview Project No. 1; that the defendants be enjoined and restrained from attempting to prosecute or continuing to prosecute the said application to assess compensation; that any action heretofore taken by the defendants with reference to the attempted appropriation be found to be null and void and for such further relief as is equitable.

It was plaintiff's contention that the attempted taking of her property is for the primary purpose of enabling the erection of a new, privately owned office building, apartment houses, restaurants and other places of business; that any determination or claim that the area was one which was blighted, deteriorated or deteriorating as defined by Ordinance 1.5102 is contrary to fact and any such determination was arbitrary, capricious and constituted a gross abuse of discretion by defendants; that the proceedings taken were merely a device to permit the utilization by the City of Cleveland of the exercise of its right of eminent domain in order to procure land upon which new privately owned buildings could be constructed—none of the land, except a small area across from the City Hall, is to be used for new public buildings.

It is plaintiff's position that the primary purpose for the appropriation proceeding is to provide lands for the erection of new office buildings and private places of business and any public welfare resulting from the taking of this land is minutely secondary—if at all; that the taking is definitely not for the purpose of slum or blight elimination—since this is not a slum or blighted area.

Evidence of the fact that plaintiff's land is not being taken for a public use is reaffirmed by the action taken by the defendants in actually agreeing to sell plaintiff's own property to a private developer for private purposes even before they owned it.

An important issue; therefore, that the pleadings put into issue, was whether or not the defendants acted arbitrarily and abused their discretion by making findings contrary to fact in order to frustrate the law and provide a device whereby they could subsequently attempt to appropriate plaintiff's property.

The answer admitted that no notice whatsoever was given to anybody by the Council of the City of Cleveland prior to the adoption of its ordinance. The only notice of any kind was that given by the Planning Commission ten days prior to the time set for the unveiling of its plan for renewal of this area. This was set for November 22, 1960.

However, this notice, which is defendants' Exhibit "D" (Original Bill of Exceptions) herein not only did not afford this plaintiff or any other property owners a right to be heard with reference to whether or not this was a slum area—a necessary prerequisite before adopting a renewal plan, but the notice actually stated that such a determination had *previously* been made by the City Planning Commission. We quote from the notice:

> "The Cleveland City Planning Commission has heretofore determined the above described area to be

both blighted or deteriorated or deteriorating area within the definition of Section 1.5102 of the codified ordinances of the City of Cleveland."

The pleadings and evidence further established that the defendant, City of Cleveland, had, prior to any action herein, entered into an agreement in writing to sell plaintiff's property to the Erieview Corporation, a private Ohio corporation for profit. This contract, which is in evidence, provides that the land in question must be used for the construction of a 40-story privately owned, operated and maintained office building for the private benefit of the said Erieview Corporation. Such facts were further admitted and stipulated into evidence.

Plaintiff's petition describes this process of getting her private property to the Erieview Corporation as "conduiting" her property to that corporation. The conduit, of course, is the City of Cleveland; from a private citizen to a big private developer—through the City of Cleveland.

At R. 217, the City admitted such intended transferring of plaintiff's property:

> "The Court: Conduiting it in, but it is a good word, conduiting it from one private person to another private person for a private purpose.
>
> Mr. Lansdale: I appreciate that, sir.
>
> The Court: That is more or less admitted, is it not?
>
> Mr. Lansdale: Oh, yes. * * *
>
> The Court: Well, I think the answer admits it is taken for private use of a business, private business, not a public.
>
> Mr. Lansdale: There's no question about that, Judge."

The trial court, however, refused to permit any testimony in support of the averments of plaintiff's petition that the area in question did not qualify as a slum or

blighted area so that the right of eminent domain would not be applicable herein and that any determination of such fact by the defendants was arbitrary, capricious, contrary to fact and constituted a gross abuse of discretion.

Plaintiff's constitutional right to seek redress to the courts in this respect was substantially deprived her. This ordinance, purporting to have been enacted to protect the public health, morals or safety has no real or substantial relation to those objects and the evidence, if permitted, would have shown, beyond all question, that it constituted a plain, palpable invasion of rights secured by Federal law, and is repugnant to the U. S. Constitution and congressional enactments.

Federal law in this respect is contained in the Ordinance of 1787 (Appendix "G") adopted by Congress July 13, 1787, which provided for "An ordinance for the government of the territory of the United States northwest of the river Ohio." This included the territory which now comprises the State of Ohio. It provided fundamental protections for the people in this area.

Section 14 provided as follows:

"It is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said territory and forever *remain unalterable unless by common consent*, to-wit:

ARTICLE II.

The inhabitants of the said territory shall always be entitled to the benefits of the writs of habeas corpus, and of the trial by jury; of a proportionate representation of the people in the Legislature, and of judicial proceedings according to the course of the common law. All persons shall be bailable, unless for capital

offences, where the proof shall be evident, or the presumption great. All fines shall be moderate and no cruel or unusual punishments shall be inflicted. No man shall be deprived of his liberty or property, but by the judgment of his peers, or the law of the land, and should the public exigencies make it necessary, for the common preservation, to take any person's property, or to demand his particular services, full compensation shall be made for the same. And, in the just preservation of rights and property, it is understood and declared, that no law ought ever to be made or have force in the said territory that shall, in any manner whatever, interfere with or affect private contracts, or engagements, bona fide and without fraud previously formed."

This compact has never been altered by common consent and is still as much in full force and affect, in providing protection for the citizens of what is now the State of Ohio, as it did in 1787.

Attention is called to the fact that this compact, which is in the nature of a superconstitution, only permits the taking of private property when it would be for the "common preservation", and inhabitants shall be entitled to "Judicial Proceedings according to the course of the common law." This is certainly not the situation in this case.

The Court refused to hear any evidence as to the ineligibility of this area for urban renewal and disregarded the fact that no notice was given plaintiff prior to finding the area to be a slum or blighted area.

It was important that the Court accept evidence as to whether the area involved herein *was* or *was not* a slum or blighted area. This was offered as bearing upon the question the court was called upon to determine as to whether defendants were attempting to take plaintiff's property for a private use.

The only public use or public welfare (as claimed by the defendants) involved in this taking was such as would result from the elimination etc. of a slum or blighted area. If the evidence showed that the area was not slum or blighted and, therefore, such elimination was not involved, then no public use or public welfare resulted from the taking. If the taking was not primarily for the public use or public welfare, it would necessarily be for the only other basis for a taking—a private use.

The Court, upon finding from the evidence, that this taking was not for the purpose of slum elimination—because it did not exist—would be obliged to grant the plaintiff's petition.

Because the trial court here refused to hear any such evidence either as it applied to the use for which the property was being taken or as bearing upon whether the Council and City Planning Commission acted arbitrarily and capriciously and in an abuse of discretion in adopting the ordinance and resolution in question, it committed error,—and deprived her of constitutional rights.

In refusing all such testimony, the Court said (R. 169):

> "The Court: Suppose the Council acted on false information?
>
> The cases are clear that the Court cannot go beyond the legislative act. I can't get away from it, Mr. McMonagle.
>
> It's a hard rule, granted, but yet there is logic in it because, after all, the Council has the right to be the judge of its actions, and if it makes a misjudgment, I may not agree with what they did—I may feel it is a big mistake to tear down the Auditorium Hotel and I may not see any reason for it at all but, yet, I am not entitled to go into that and I am not entitled to go into these facts upon which Council based its

conclusion that it should take action and on which it did not take action.

I am convinced of that; I just can't get away from that."

The same results were had upon attempting to elicit testimony from the planning expert (R. 179), Mr. Alfred C. Grisanti, whose qualifications were acknowledged.

R. 205:

"The Court: I think he's an expert in this field. He's well qualified."

However, the Court refused to permit the witness to testify that a preponderance of the structures in this area were not detrimental to public health, safety or welfare.

The witness was also prohibited from testifying that there was not a preponderance of defective or inadequate street layout in this area at the time in question.

The witness was further prohibited from stating, in his opinion, that there was not a predominance of defective or inadequate street layout or faulty lot layout with relation to size, adequacy, accessibility or usefulness or unsanitary or unsafe conditions or deterioration of site improvements (R. 208).

The witness was further prohibited from testifying as to whether there was a preponderance of conditions which endanger life or property by fire or other causes present in that area.

The witness was further prohibited from testifying that the area did not contain obsolete or substandard structures or incompatible land uses which retard the provision of necessary housing conditions or constitute an economic or social liability or a danger to the public health, safety, morals or general welfare of the area's condition and use.

The witness was further prohibited from testifying that the sale of his mother's property to Mr. Galbreath for his private use did not, in any way, contribute to any public welfare.

In the within case, the Court refused to hear any evidence that would, in any manner impeach the determination by the City Council that the property in question was blighted. The Court and parties concerned stated that they recognized the law to be that such a determination by the City Council was final unless the determination was arbitrary, unreasonable and constituted a gross abuse of discretion.

The petition of the plaintiff herein definitely and specifically averred that the action of the Council was contrary to fact and was arbitrary, unreasonable and constituted an abuse of discretion.

It is elementary that a determination which was actually contrary to fact would constitute an arbitrary, unreasonable act and such determination would constitute a gross abuse of discretion. As is indicated in the cited authorities, reviewing courts have held that actions by inferior courts constituted an abuse of discretion. Various courts have held that enactments by the legislature and the City Council were so unreasonable and unrelated to the public health, safety and welfare so that the Courts have set them aside as being unconstitutional. However, before a determination was made that the action was arbitrary, unreasonable and constituted a gross abuse of discretion, the Courts looked into the facts. In other words, they took testimony to determine actually what the true facts were. The legislative body could not be held to contend that two plus two equals four merely because they so determine that to be a fact. In practically

every instance, the Court, where it is asked to determine that the finding of a legislative body was unconstitutional, accepted evidence bearing on the fact in issue. The trial court in this case refused to so do.

While the evidence should have been permitted by the Court as bearing upon the question as to whether or not the action of the City Council was arbitrary, capricious, unreasonable and constituted a gross abuse of discretion, it further should have been admitted as bearing upon the question as to whether or not the taking was for a public use. The question "What is a public use?" is a judicial one. The trial court admitted evidence of the fact that the 40-story office building to be built on plaintiff's property was to be a private enterprise. Evidence as to the type of and the conditions existing in the area should also have been properly admitted as providing evidentiary basis to the court upon which to make a determination as to whether or not the use was to be private or public. If the area and the structures therein were not such as were detrimental to the public health, safety and welfare, then the only logical finding the Court could make would be that the purpose for the taking and the use to which the property was subsequently to be put was private and its taking illegal. If the conditions were shown to be such that their taking did not eliminate slums etc. because slums did not exist, then the taking would, therefore, be not primarily public and must be entirely private. It was obviously prejudicial, reversible error for the Court to refuse to hear any evidence whatsoever with respect to the condition of the area, whether slum, blighted, residential, industrial, etc.

There is no question from the law that under the averments of the pleadings and the circumstances in this case that the Court should have admitted evidence as to

whether or not the Council acted arbitrarily and abused its discretion in adopting the ordinance that has the effect of permitting the appropriation of the Grisanti property. As previously indicated, this is for two reasons: one as to whether or not the property is going to be taken for a public use and the other as to whether or not the Council acted arbitrarily in the adoption of this ordinance. The first basis is, of course, a matter that can always be judicially inquired into. The second may be judicially inquired into if there is an averment of a gross abuse of discretion which exists in the within case. The only manner in which the Court could determine as to whether there was such a gross abuse of discretion was to hear the evidence as to the facts.

In *Sargent v. City of Cincinnati*, 110 Ohio St. 444, 144 N. E. 132, the court says, at page 451:

> "All these legislative functions relate to the necessity and exigency of the taking, but owners of private property may judicially inquire whether the specified use is a public use or whether such use will justify or sustain the compulsory taking of private property, and even though the legislative authority has declared the use to be a public one, *the courts may properly inquire into the good faith of such declaration and whether there has been a manifest abuse of power.*" (Emphasis added.)

In evaluating an ordinance in the light of constitutional provisions, the pronouncement of the Supreme Court of the United States, in *Jacobson v. Commonwealth of Massachusetts*, 197 U. S. 11, 49 L. Ed. 643 is applicable:

> "* * * If there is any such power in the judiciary to review legislative action in respect of a matter affecting the general welfare, it can only be when that which the Legislature has done comes within the rule that, if a statute purporting to have been enacted to

protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, or is, beyond all question, a plain, palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge and thereby give effect to the Constitution."

Mumpower vs. Housing Administration of Bristol, 176 Virginia 426, 11 S. E. 2d 732. In this action, the Court clearly indicated that where a pleading raised the question as whether or not the legislative action was arbitrary or unreasonable, evidence bearing upon such allegation was properly admissible. The Court in that case said:

"There is nothing in the pleadings to suggest that the legislature acted arbitrarily or unreasonably. Its enactment must be sustained unless 'it is clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare.'"

In *Shenk v. City of Pittsburgh*, 364 Pa. 612, the Court held that in the absence of an indication that the City Planning Commission did not act in good faith, or was wholly arbitrary in certifying an area for removal, that the certification of that area was not subject to judicial review. However, where an averment was made that the planning commission was arbitrary in certifying the area, a judicial inquiry thereon should properly be taken and judicial determination thereof would be made from the evidence adduced at the trial.

It is fundamental that all citizens have ultimate recourse to the courts for redress of wrongs suffered them by actions of legislative bodies. It is an elementary principle of law that there is at least one appeal available in every action affecting the right of an individual. This is either by way of a specific statutory appeal, mandamus, pro-

hibition, procedendo or injunction. In the instant case, while it is stated that the plaintiff's rights are protected by means of an injunctive proceedings, this becomes meaningless when a litigant is prohibited from introducing evidence in support of the averments which, if proven, would give the relief to which she is entitled. The Court's action is repugnant to the Northwest Ordinance of 1787.

Eminent authority holds that the trial court erred in not permitting the proffered evidence.

In *Bahr Corp. v. O'Brion*, 146 Conn. 237, 149 A. 2d 691 (1959), the Supreme Court of Errors held that where the owner contended that taking was for a private, not a public purpose, and that the inclusion of owner's property within redevelopment area was unreasonable, arbitrary, discriminatory and an abuse of agency's powers, redevelopment agency determinations are subject to judicial review to discover if they are unreasonable or in bad faith or are an abuse of the power conferred and that the trial court erred in refusing to admit the proffered evidence and remanded the case for a new trial.

Bahr owned business property in downtown New Haven included in a ninety-six acre project, and situated in a choice retail location. The project site included the four highest priced blocks in downtown New Haven. Called the Church Street Project, the total redevelopment cost was estimated at $85 million in federal, state, local and private capital. One of the project's avowed aims was to stimulate lagging business in the commerical center of the city, to lure back the consumer from suburban shopping centers, and thus to bolster declining downtown land values and prevent the subsequent tax losses to the city.

The *Bahr* decision may be implicitly based on the inadequacies of the present system in urban redevelopment projects. The public hearing required by redevelopment

statutes, unlike the judicial-type hearings conducted by traditional administrative agencies, afford little or no protection to affected property owners. An agency invests thousands of dollars and man hours in planning and preparation prior to the public announcement of a project and hearing, expenditures which can produce officials committed to a project before the public and affected property owners have had any opportunity to voice any opposition. A redevelopment campaign which could resolve the political future of its official advocates does not encourage maximum agency impartiality. The close co-operation between private developers and the local agency during the formative stages of project planning and administrative considerations which demand the rapid and unhindered transition of a project from planning to execution greatly influences agency open-mindedness when a project comes up for approval.

With insufficient resources, short notice and no subpoena power, an objecting property owner is unable to prepare any adequate challenge at a public hearing.

The Court, at page 697 of the *Bahr* opinion, states:

> "The agency has asserted that an early determination of the questions raised by these appeals is of great importance to the public. If that is true, it is unfortunate that, during the trial, the agency resisted every effort by the plaintiff to introduce evidence to prove that its property was being taken for a private use rather than a public one, or that the taking of it was unreasonable or an abuse of the power conferred upon the agency. Of course, as in any case where a new trial is ordered because the court erred in excluding evidence, we cannot say that if the evidence which was offered had been received the court would have concluded that the plaintiff had sustained the burden of proving its allegations. The agency, however, must

assume at least part of the responsibility for the delay which will be caused by the necessity for a new trial."

To protect the property owner for the compilation of an adequate record for review, the trial court is now the only forum available where the property owner has rights with power to subpoena, swear, and cross-examine witnesses, in order to determine if the planning commission or urban renewal agency did reasonably support its findings in all respects.

The Court, in the *Bahr* opinion, cites three cases that the redevelopment agency determinations are subject to judicial review. *Gohld Realty Co. vs. Hartford*, 141 Conn. 135, 156, 104 A. 2d 365, 371; *Water Commissioners vs. Johnson*, 86 Conn. 151, 159, 84 A. 727, 730; and *Connecticut College vs. Calvert*, 87 Conn. 421, 424, 88 A. 633, 635.

Other courts have held that land owners raise a fully triable issue when they deny that the site is substandard, and if they allege also that its selection was arbitrary or in bad faith. *Offen vs. City of Topeka*, 186 Kansas 389, 350 P. 2d 33 (1960), at page 35:

"In the instant case, the plaintiff's property is being taken and demolished for the purposes of an urban renewal plan. It is not the property of the general public that is being taken, and the general public has no particular interest in the individual property of the plaintiffs. Plaintiffs allege that the action of the Commission in passing the two resolutions taking their property was arbitrary, capricious, illegal and unlawful, and the resolutions were therefore void. Under such circumstances, we have held that where a private citizen is likely to be injured in some special manner or whose situation is peculiarly affected by the exercise of usurped authority, he may maintain an action for injunctive relief."

At page 36, the Court concluded:

"The facts here appear to be a matter of public, as well as private, concern and are of vital importance to both. The remaining questions, in the very nature of their character and importance, are ones that should not be determined in the absence of a full disclosure of all the pertinent facts. It would be well for the parties to join issues by proper pleadings and to have the case tried on the merits. * * *"

In recent years, at least one area designation has actually been invalidated, accentuating a discernible trend towards expanded review of redevelopment condemnations. *Bristol Redevelopment & Housing Authority vs. Denton*, 198 Va. 171, 93 S. E. (2d) 288 (1956). The Court said, at page 294:

"We come then to the question, Does the evidence warrant the finding of the lower court that the area as a whole is not in fact a slum, blighted or deteriorated area. * * * For the reasons hereinafter stated, we conclude that it does.

The record shows that a large number of witnesses testified on the subject. In its written opinion, the lower court commented on the fact that it had heard the testimony of one or more persons with respect to 'practically every parcel in the area.' Moreover, the opinion shows that the lower court had carefully inspected the area and was acquainted with its nature. In passing on the sufficiency of the evidence, we view it in the light most favorable to the lower court's finding which has settled all conflicts.

At page 295, the Court concludes:

"It thus appears that the basic contention of appellants is that the area as a whole qualifies for redevelopment because it is a 'blighted or deteriorated' area as defined in section 39-49 (1). *Since the evidence clearly shows* that the area as a whole does not meet that statutory definition, it necessarily follows

that the action of the local Authority in finding that because of this condition the property should be acquired for redevelopment purposes, and the action of the council on approving the project, were devoid of legal authority, arbitrary and unwarranted. Consequently, the appellees were entitled to the relief prayed for in their bill.".

The proceedings established that the attempted appropriation of plaintiff's property is not for a public use even though the Court refused to hear evidence as to the makeup of the area involved. The plaintiff was entitled to a decree in her favor on this phase of the matter, with what admissions were made by the defendant and such evidence as was admitted, and the fact that the defendants offered no testimony—only copies of some self-serving enactments.

Mr. Ralph Locher, Director of Law of the City of Cleveland, counsel for the defendants in this case, in his opening statement to the Court made the above contention:

"We call it urban renewal and we are talking about urban renewal in this case. We are talking about many aspects of urban renewal which have been accomplished over the years, and this is not the first time that we are using the *device* of urban renewal in this community, nor the first time that we have acquired many, many parcels of land to be transferred to a private developer because unless we can create an accumulation of land, you cannot enter upon an enterprise which will substantially improve the economic and commercial life, as well as the living accommodations of a great city. *That* is the *process* that is being used by the City of Cleveland. * * *"

Webster's Dictionary defines "device" as follows:

"1. a thing devised; plan; scheme

2. an underhanded scheme; trick

"to one's own device—allow to do as one wishes."

The right of exercising eminent domain does not prevail in a case such as the instant one where the facts indicated that there are only a very small percentage of structures that were substandard and that the total area (exclusive of streets that are not to be disturbed) consists of 3,165,142 square feet of land; that of this area, 2,524,335 square feet or 79.7% have no structures thereon; the area being zoned semi-industrial, with practically no residences. These figures are taken from the maps that are in evidence.

Mr. James Lister testified that a contract had been entered into to sell plaintiff's land prior to the time of its appropriation.

The City of Cleveland has actually divested itself of our land, even before it owned it, by entering into an apparently enforceable contract to sell it to the Erieview Corporation for private purposes, immediately upon gaining title to it.

It is elementary that the contract for the sale or purchase of real property is the basic controlling instrument between parties.

Defendants and the Erieview Corporation, by this device, firmly, finally and conclusively eliminated any valid contention that our property is being taken for a public use.

There cannot be any public use or purpose in the taking land when, while the title is still in the plaintiff's name, a private corporation has been already given the use, domination and control thereof by the contract already concluded between the City of Cleveland and the Erieview Corporation.

The taking of title to our land by the City of Cleveland is merely a fiction;—it actually constitutes a conduit or a means of attempting to convey plaintiff's right and ownership directly to another private individual.

Equitably, the City of Cleveland will never be the owner of our property.

Equitably, between the City of Cleveland and the Erieview Corporation, the Erieview Corporation is already the owner.

Certainly, when basic constitutional rights of a citizen are involved, the Court will never countenance such a subterfuge or, as an elementary proposition of law, close its eyes to obvious facts by permitting that to be done indirectly which could not be done directly. If the Cleveland appropriating ordinance were to say that the purpose of the taking was to turn it over to the Erieview Corporation for a privately owned office building, the injunction would be automatic.

Actually, the City of Cleveland is pretending our property is to be appropriated to eliminate conditions detrimental to the public health, safety or welfare when actually, under circumstances bearing no relationship to the conservation of public health, welfare, morals or safety. The City of Cleveland is using the "device" of urban renewal to eliminate small businesses by the accumulation of relatively small parcels of land into large tracts so as to provide adequate land for the construction of a private office building by a private corporation.

Counsel for the defendants will look in vain for any authorities to sustain this abuse of defendants' powers and the attempted infringement of plaintiff's rights. Fundamental law prohibits the use of this device.

Plaintiff possesses basic constitutional rights. These include protection of a citizen from the government and

are included in the following sections of the United States Constitution:

Amendment IV:

"The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause, supporting by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Amendment V:

"No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for *public* use without just compensation."

In *Cincinnati vs. Vester*, 281 U. S. 439, the Court said:

"In considering the application of the 14th Amendment to cases of expropriation of private property, the

question what is a public use is a judicial one. *Sears vs. City of Akron*, 246 U. S. 242, 251."

At page 447:

"Under Article XVIII, Section 10 of the Ohio Constitution which provides that a municipality in appropriating property for a public use may 'in furtherance of such public use' appropriate an excess over that actually to be occupied by a proposed improvement, and under No. 3679, General Code of Ohio, which requires that in the making of an appropriation there shall be a resolution of the municipal council 'defining the purpose of the appropriation' etc., a condemnation of private land in excess of that taken for widening a street cannot be sustained where its purpose is stated in the resolution only as being 'in furtherance' of the widening of the street and 'necessary for the complete enjoyment and preservation of said public use' and where a like general, but no specific explanation of purpose is in the ordinance providing for the excess appropriation."

At page 448:

"The power conferred on a municipal corporation to take private property for public use must be strictly followed."

At page 449:

"Questions relating to the constitutional validity of an excess condemnation by a city should not be determined upon conjecture as to the contemplated purposes when the object of the excess appropriation is not set forth as required by the local law."

"This was a suit brought by the owners to restrain the appropriation of their property by the City, upon the grounds that the taking was not in accordance with the applicable provisions of the Constitution and the statutes of Ohio and would constitute a deprivation of property without due process of law in viola-

tion of the 14th Amendment, it being alleged that the appropriation was not for a public use.

Under the law of Ohio these questions can be raised only by injunction proceedings. P. C. C. & St. L. Railway Co. vs. Greenville, 69 O. S. 487, 497; Sargent v. Cincinnati, 110 O. S. 444.

Decrees in favor of plaintiffs for a permanent injunction were entered in District Court and affirmed by the Circuit Court of Appeals. 33 F. (2d) 242. This Court granted writs of certiorari. 280 U. S. 545.

The plaintiffs alleged in their bills of complaint that the excess condemnation is a 'mere speculation upon the anticipated increase in the value of the properties adjacent to said improvement' and that the properties were taken 'with the design of reselling the same at a profit to private individuals to be used for private purposes, and no use of said property by or for the public is intended or contemplated.'

The answers of the City denied these allegations and summed up the position of the City by saying that the application of the principle of excess condemnation in these cases would enable the City:

1) 'to further the appropriate development of the south side of Fifty Street' by using or disposing of the excess properties in tracts 'with such size and such restrictions as will inure to the public advantage' and

2) that the increase in value of the properties in question which may accrue by reason of the improvement contemplated by the City 'will pay in part the heavy expenses to which the City will be put in effecting the improvement.' "

The Court's holding was that such a taking as was attempted was in violation of the 14th Amendment, and the plaintiff's decrees in the lower courts were affirmed.

The facts in the instant case are more aggravated but demand the same decree. In the *Vester* case, the City had not already sold the property before it procured it.

The rule in Ohio, as elsewhere, is that the power conferred upon a municipal corporation to take property for public use must be strictly followed. *Roosevelt Hotel Building Co. vs. Cleveland*, 25 O. A. 53, 63, 64; *Farber, et al. vs. City of Toledo*, 104 O. S. 196, 200.

Whether the taking is for public purposes or public welfare is to be determined by the Court from the evidence. Obviously, all the facts surrounding the taking or pertinent to it must be taken into consideration. The cases of *State, ex rel. Bruestle vs. Rich*, 159 Ohio State, page 13 and *Berman vs. Parker*, 348 U. S. page 26 were admittedly only concerned with the actual elimination of slums as such, but also provided low cost housing—a worthy public purpose. Slum clearance and the providing of adequate housing are obviously directly related to the conservation of public health, welfare, morals and safety.

Under no stretch of the imagination can the construction of this office building have that relationship. The elimination of a man's job is definitely so related.

We are, therefore, herein directly concerned solely with the use to which the property is to be put.

The *Vester* case, *supra*, has demonstrated the requirement that constitutional and legal provisions providing for the protection of rights of citizens are to be strictly construed in favor of the citizen.

Pontiac Improvement Co. vs. The Board of Park Commissioners of The Cleveland Metropolitan Park District, 104 Ohio State 447:

> "Syl. 1: The right of eminent domain belongs to the sovereign power, and statutes delegating authority to exercise it must be strictly construed. When it is sought to take the property of an individual under statutes granting such authority to corporations, subject to conditions specifically set forth, the protection of the constitutional guaranty of the right of private

property requires that the powers granted by the legislature be strictly pursued, and where the authority granted is to acquire a fee or lesser interest the term 'lesser interest' cannot be construed to mean authority to prescribe regulations from time to time as to the manner in which the property may be used or improved by the owner while he is in possession."

We submit that the evidence clearly establishes that the use to which plaintiff's property is to be put is a private one.

In the case of *Cooper vs. Williams*, 5 Ohio 391, the Court held that the authority of the canal commissioners to take private property "* * * must be exercised without doing the owners unnecessary damages and for the purpose of the canal alone."

In *McQuillan vs. Hatton*, 42 Ohio State 202, the Court said, at page 204:

"Article I, Section 19 of the Constitution provides that 'private property shall ever be held inviolate, but subservient to the public welfare'; thus placing beyond question, that private property cannot be taken for a mere private use. *McArthur vs. Kelley*, 5 Ohio 139; *Shaver v. Starrett*, 4 Ohio St. 498; *Reeves vs. Treasurer Wood Co.*, 8 Ohio St. 345.

* * * The use must be for the public at large. *Memphis Freight Co. vs. Mayor*, 4 Cold. 419. The use that will justify the taking of private property by the power of eminent domain, is the use by or for the government, the general public or some portion of it; and *not* the use by or for particular individuals, or for the benefit of certain estates. The use may be limited to the inhabitants of a small locality, but the benefit must be in common and not to a very few persons or estates.

The prosperity of each individual conduces, in a certain sense, to the public welfare, but this fact

is not a sufficient reason for taking other private property to increase the prosperity of individual man.

The draining of marshes and ponds may be for the promotion of the public health and so become a public object; but the draining of farms to render them more productive, is not such an object.

The other errors complained of refer to the question whether or not the proposed ditch would be a public benefit or only a private benefit."

19 *Ohio Jurisprudence* 2d, at page 430:

"Private property can be taken only for a public use. The legislature has no power to authorize the taking of the property of one individual, without his consent for the private use of another, even on the payment of full compensation."

19 *Ohio Jurisprudence* 2d, at page 435:

"Many authorities, in determining what is a public use, regard as one of the controlling considerations the right of the public to use or have service from the improvement for which land is to be appropriated, as a matter of right, and not as a mere favor. It has been said that the public use of anything is the employment or application of the thing by the public, and that public use means the same as use by the public."

Decisions relied upon by the defendants are concerned with the phrase contained in Article I, Section 19 of the Ohio Constitution that the "private property shall ever be * * * subservient to the public welfare * * *." They completely ignore the definite wordage of the Fifth Amendment of the United States Constitution that makes mandatory the taking shall be for public use as distinguished from public welfare. We quote:

"* * * nor shall *private property* be taken for *public use* without just compensation."

From the foregoing, the Court should have granted the prayer of the plaintiff's petition because the use to which plaintiff's property is to be put is not primarily public. The action taken was clearly erroneous.

The city ordinance and resolution must fail because of the absolute failure to give any prior notice whatsoever before the area was determined to be slum or blighted; and that it is not predominately residential.

A municipality just can not go ahead and find that a whole area is slum or bligh. .d and all the owners therein *must* give up their properties without prior notice to the property owners. This is a fundamental right.

Attention is again called to the fact that while the defendants wanted to contend that the notice from the City Planning Commission (Defendants' Exhibit "D") could also be considered notice from the City Council, this is absolutely erroneous, as the City Planning Commission and the City Council are two separate and distinct bodies —each separately established by the City Charter and each having separate and distinct duties.

Chapter 5 of the City Charter (fully contained in the record) establishes the City Council and provides that "the legislative powers of the City * * * shall be vested in a council; each member of which shall be elected from a separate ward."

Chapter 11 of the City Charter is captioned "The Executive" and provides:

Section 67:

"The executive and administrative powers of the city shall be vested in the mayor, directors of departments and other *administrative offices provided for in this chapter* or by ordinance."

This Chapter (Chapter 11) provides for a city planning commission:

"§ 76: *There shall be a city planning commission composed of seven members.*"

The City Planning Commission is part of the Executive—not Legislative—branch of the government.

Under no stretch of the imagination can it be contended that a so-called notice of a proceeding before an executive branch of the government can be considered as the notice required to be given by the legislative branch before one of its actions can become legal.

Where the defendants contend that notice of an executive proceeding should be considered as notice of a legislative proceeding, they are obviously conceding the necessity for the legislative notice, admitting its failure to have been given, and that this failure voids the legislation. However, no notice was ever given by the City Planning Commission prior to its determination that the area was slum or blighted.

We again quote from the notice:

"The Cleveland City Planning Commission has heretofore determined the above described areas to be both blighted or deteriorated and deteriorating within the definition of Section 1.1502 of the codified ordinances of the City of Cleveland."

Is a property owner afforded her "due process rights" when she is not given notice affording adequate time for an opportunity to defend her rights at a fair and impartial hearing, and where a City Planning Commission advises her, in substance, that it has already made the requisite findings to enable appropriation of her property? The Commission unveiled a redevelopment plan on November 22, 1960 which embodies 190 acres of downtown Cleveland, contemplated the municipality's appropriation of practically that entire area with the demolition of about 235 structures, including hotels, office buildings, parking

garages, homes and commercial and industrial buildings, the removal of about 43 families, the elimination of 429 separate commercial and industrial businesses, the construction of many new structures therein, the almost entire abandonment of the present general business and commercial areas of downtown Cleveland and, despite protest that there has been insufficient time to fully comprehend the plan let alone investigate its many facets as affecting the property owner and where the City Planning Commission then adopts the plan without any variation whatsoever on November 25, 1960, 1960—3 days later.

While the case of *State, Ex Rel. Hoel, Prosecuting Attorney vs. Brown*, 105 Ohio State 479, is not factually pertinent to the instant one, it contains definitions as to "due process" which are applicable herein.

> "Various definitions have from time to time been announced: ' "Due Process of Law" in each particular case means such an exertion of the powers of government as the settled maxims of the law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs.' (18 Cyc. 1080, and cases cited.)"

At page 487:

> " 'A law, which hears before it condemns; which proceeds upon inquiry, and renders judgment only after trial.' "

Here there was no adequate notice, a failure to afford a fair and impartial hearing and the positive infringement on constitutional rights of the plaintiff. The obligations of the defendants and the rights of the plaintiff are discussed in the following cited cases. Minimum protections provided to the plaintiff in these respects have not been com-

plied with and justice can only be done the plaintiff by the granting of the prayer of her petition herein.

State, etc. vs. Fairchild, 224 U. S. 510, was an action by the railroad to stay the enforcement of an order of the Public Utilities Commission of Washington having the effect of taking property of the railroad.

> "Syl. 2: The hearing which must precede an order taking property must not be mere form, but one which gives the owner the right to secure and present material evidence; * * *."

It is well known that the court's task of interpreting the constitution and making it applicable to the needs of present day American life and problems is a formidable one; that it is not an ordinary one of adjudication since it is to affect the thought of a modern America, with complex social and economic structure, and yet there is the thought that it is only the court alone which can make effective those barriers against oppression which the people of this nation in the years gone by have so prudently erected as restraints against themselves in the moments of anxiety and passion.

At page 523, the Court said:

> "The order * * * could not be sustained merely because of the fact the carrier had been given an opportunity to be heard, but was to be tested by considering whether in view of all the facts, the taking was arbitrary and unreasonable or was justified by the public necessities which the carrier could lawfully be compelled to meet."

At page 524:

> "For the guaranty of the Constitution extends to the protection of fundamental rights * * * to the substance of the order as well as to the notice and hearing which precede it.

> So that where the taking is under an administrative regulation, the defendant must not be denied the right to show that as a matter of law the order was so arbitrary, unjust or unreasonable as to amount to a deprivation of property in violation of the 14th Amendment. Chicago & C. R. R. v. Minnesota, 134 U. S. 418; Smyth v. Ames, 169 U. S. 466; Chicago & C. R. R. v. Tompkins, 176 U. S. 167, 173.
>
> * * * for the hearing which must precede the taking of property is not a mere form.
>
> The carrier must have the right to secure and present evidence material to the issue under investigation. It must be given the opportunity by proof and arguments to controvert the claim asserted against it before a tribunal bound not only to listen but to give legal effect to what has been established."

This decision reiterates what are elementary due process requirements before a person's property shall be taken from him. They are:

(A) Notice given in sufficient time prior to a hearing to afford the property owner sufficient time for the preparation and trial of his case.

(B) The hearing which must precede an order laying the foundation for the exercise of the right of eminent domain must not be mere form, but one which gives the owner the right to *secure* and present material evidence.

(C) A finding cannot be sustained merely because a property owner had been given an opportunity to be heard, but it is to be tested by considering whether, in view of all the facts, the taking was arbitrary and unreasonable.

(D) The owner must not be denied the right to show that as a matter of law the order was so arbitrary, unjust and unreasonable as to amount to the deprivation of property in violation of the 14th Amendment.

(E) A property owner should be afforded the time for and benefit of *compulsory* process to secure and present evidence in her behalf; to cross-examine witnesses; to present evidence on every material matter.

The unrefuted testimony in the instant case was that the so-called hearing of November 22, 1960 was "a hippodrome." There were insufficient copies of the plan available; the persons present were not advised that they had the opportunity to subpeona witnesses and present testimony or else such right was actually not afforded the persons attending the hearing and requests for postponement were ignored. Is this "due process"?

The plan was automatically adopted as proposed, three days later. The meeting consisted of a mere unveiling and disclosing of that which had been decided was to be done with the private property in this area.

We wish to call to the attention of the Court that only three (3) days elapsed from the unveiling of this huge project until its approval by the City Planning Commission. No notice was given by the City Council of its contemplated action. *The enactment by the City Council was as an emergency under the suspension of the rules* and plaintiff's constitutional rights were completely disregarded.

In this case, admittedly no prior notice was given to the property owners. Can it be that the foundation can be laid for the taking of plaintiff's property without any notice whatsoever?

Ohio Revised Code Section 725.01 contains a definition of blighted areas. This provides as follows:

"(A) 'Blighted area' means an area within the corporate limits of a city in which a majority of the *structures* is detrimental to the public health, safety

or welfare by reason of age, dilapidation, overcrowding, faulty arrangement, lack of ventilation or sanitary facilities, or any combination of these factors, and which is detrimental to the public health, safety or welfare because the majority of such structures fails to conform in one or more of the respects to the ordinances comprising the building code or the ordinances relating to safety, health or sanitation in such city."

Revised Code Section 725.03 (e) provides as follows:

"*The legislative authority, prior to its determination* that an area is a blighted area, prior to the adoption of a development plan, and prior to the finding by it with respect to displaced families as provided in division (d) of this section, *shall hold not less than two public hearings thereon*, at which hearings an opportunity shall be provided for all persons interested to be heard either in person or by counsel. Notice of the time and place of such hearings shall be published in a newspaper of general circulation in the city and the area affected, once each week for two consecutive weeks, and such publication shall be completed not less than thirty days prior to the date set for the first of such hearings. *Notice of the first of such hearings shall be mailed, at least twenty-five days before the first hearing*, to the last known owner of each parcel of land in such area at his last known address as shown by the records of the county auditor. Such notice shall contain a description of the proposed development area by its location in relation to highways, streets, streams or otherwise. Such notice shall state that maps, plats and particular description of the development plan, together with such zoning maps and ordinances as relate thereto, are available for public inspection at a place designated in the notice. The failure of any owner to receive a copy of such notice shall not invalidate the proceedings of the legislative authority."

The defendants admit that this statute was not complied with. *The failure to comply with it will obviously invalidate the proceedings as applicable to this plaintiff.* Defendants contend that the Home Rule Provision of the Ohio Constitution eliminates the necessity for complying with Revised Code Section 725.04. Such is not the law.

They submit no valid reasons why no notice whatsoever should not be given to the property owner before taking such valuable rights away from her. Chapter 725 and all ordinances pertaining to slum clearance etc. were based upon an exercise of the police powers.

A municipality may not enact police, sanitary and similar regulations in conflict with the general rules. Article XVIII, Section 3:

> "Municipalities shall have authority to exercise all powers of self-government and to adopt and enforce, within their limitation, such local police, sanitary and other similar regulations, as are not in conflict with general laws."

Chapter 725 is certainly a police, sanitary and other similar regulation.

The ordinance, that is, No. 2428-60 (Appendix "G") upon which the defendant relies contains the following recital that is proof of its being a police, sanitary and other similar regulation:

> "Whereas, this ordinance constitutes an emergency measure required for the immediate preservation of public property, health and safety because of the existence of slum and blighted areas and conditions of deterioration menacing the public health and safety of Citizens of Cleveland; Now Therefore:"

The provisions of Revised Code Section 725.03, not having been complied with, the ordinance in question is void.

2. THE FEDERAL QUESTION.

The Federal Questions sought to be reviewed were raised in this case in the first instance, in the petition filed in the Common Pleas Court, it being alleged as follows:

> "Plaintiff avers that, having consideration for the scope of the proposed project and its effect upon her property and that of all other owners in said area, in addition to being contrary to the statutes of Ohio, that the short time allowed to plaintiff of the notice of the meeting was unreasonable and arbitrary and the purported adoption of said plans and ordinance constituted the arbitrary taking of property of plaintiff without due process of law and is in violation of the Ohio and United States Constitutions.
>
> * * * * *
>
> Plaintiff incorporates herein by reference all of the averments and allegations of her First Cause of Action, Second Cause of Action, Third Cause of Action and Fourth Cause of Action and further avers that the said attempted appropriation and/or purchase of her said premises and of all other premises in said area does not constitute a taking of private property for a public use and is contrary to the Ohio and United States Constitutions."

The fact of the repugnancy of the proceedings complained about, to the provisions of the said Northwest Ordinance, were set out in the appellant's original brief filed in the Supreme Court of Ohio (pages 6 and 7). The opinion of the Court of Appeals (Appendix "A") makes reference to the claims of the appellant that she was not afforded due process of law and upholds the action of the trial court in not sustaining such claims.

This action includes the applicability of U. S. C. § 1460. (c). (Appendix H.)

3. THE FEDERAL QUESTION IS SUBSTANTIAL.

This Court has decided as recently as 1947 in the case of *Shelly vs. Kraemer*, 334 U. S. 1, 14, that "the action of state courts and of judicial officers, in their official capacities, is to be regarded as action of the state within the meaning of the Fourteenth Amendment." The Court in the *Shelly* case, *supra*, went on to say that "the action of state courts in imposing penalties or depriving parties of other substantive rights without providing adequate notice and opportunity to defend has long been regarded a denial of due process of law guaranteed by the Fourteenth Amendment." The Court continued at page 17 by stating:

> "It has been recognized that the action of state courts in enforcing a substantive common-law rule formulated by those courts, may result in the denial of rights guaranteed by the Fourteenth Amendment, even though the jurisdictional proceedings in such cases may have been in complete accord with the most rigorous conception of procedural due process."

The Court made the following statement in *Lambert vs. California*, 355 U. S. 224, at page 228:

> "Engrained in our concept of due process is the requirement of notice. Notice is sometimes essential so that the citizen has the chance to defend charges. Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed. Notice is required in a myriad of situations where a penalty or forfeiture might be suffered for mere failure to act. Recent cases illustrating the point are Mullane vs. Central Hanover Trust Co., 338 U. S. 306; Covey vs. Town of Somers, 351 U. S. 141; Walker vs. Hutchinson City, 352 U. S. 112. These cases involved only property interests in civil litigation."

The urban renewal project in question herein is related to and is a part of the proceedings of the Housing and Home Finance Agency of the United States of America under authority to make loans and grants of federal funds in billions of dollars to municipalities in the United States. Substantial federal questions are presented herein and call for a decision by the Supreme Court of the United States as to whether any municipal planning commission and/or council may appropriate, with federal money, an area admittedly not predominately residential (contrary to U. S. C. § 1460) and, without any notice to a property owner or any hearing, determine that the area in which the property owner's standard building is located is blighted or deteriorated and that, therefore, a municipality with the financial aid provided by the federal government may, by the exercise of eminent domain, appropriate any citizen's property and then turn it over to a private corporation for profit.

This Federal Law contemplates that some slum residential areas, such as those along railroad tracks, may be renewed into commercial or industrial areas, but does not permit the appropriation of a commercial or industrial area so it can be turned over to private developers for new business purposes.

Both this and other Federal Courts have frequently enunciated the proposition that in order to conform to the rules of due process, a court must afford to the defendant not only due notice but also opportunity to present every available defense.

In the case of *Thompson vs. McDonald* (C. A. 10th, 1938), 95 F. 2d 935, Judge Bratton, in ruling on the efficacy of administrative proceedings of the Commissioner of Insurance of Kansas, said:

"The basic requisites of due process when applied to judicial proceedings are that, having due regard to the form and nature of the proceeding and the character of the rights which may be affected, the order, judgment or decree be entered by a court clothed with jurisdiction of the subject matter and that the party or parties bound by it have notice and be afforded an opportunity to present every available defense."

In the cases of *Lambert vs. California*, 355 U. S. 224, *Mullane vs. Central Hanover Trust Co.*, 338 U. S. 306, *Covey vs. Town of Somers*, 351 U. S. 141 and *Walker vs. Hutchinson City*, 352 U. S. 112, the Court reiterated that the failure to give notice constitutes a deprivation of rights under the Fourteenth Amendment of the United States Constitution. In *Scott vs. McNeal*, 154 U. S. page 34, the Supreme Court expressly holds that whether the notice "required to constitute due process of law is involved, this court must decide for itself whether there has been such notice."

In the case of *Fiske vs. Kansas*, 274 U. S. 385, it was held, at page 385:

"And this Court will review the finding of facts by a State Court where a federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass upon the Federal question, to analyze the facts. Northern Pacific Railway v. North Dakota, 236 U. S. 585, 593; Aetna Life Insurance Co. v. Dunken, 266 U. S. 389, 394 and cases cited."

In the within case, the Court refused to hear evidence as to whether the area in question was or was not a slum or blighted area contending that he could not go beyond

the finding of the City Council to that effect. There, therefore, was no direct evidence in the record to support the action of the Court.

In *Cincinnati vs. Vester*, 281 U. S. 439 and *Sears vs. City of Akron*, 246 U. S. 242, 251, the Supreme Court held that whether the question as to whether the appropriation of private property was for a public use or a private use was a matter for its consideration.

CONCLUSION.

This appeal presents a situation where fundamental —constitutional—rights of the plaintiff have been or will be violated unless the relief is granted. It demands protection by this Court of her inalienable right to acquire and possess property (Section 1, Article I of the Ohio Constitution); that her property shall not be taken from her where the public exigencies do not make it necessary for the common preservation (Article 11, Ordinance of 1787), and the intended taking is not primarily for the public use or the public welfare (Section 19, Article I of the Ohio Constitution, Fourth Amendment, Fifth Amendment and Fourteenth Amendment of the United States Constitution); that her due process rights (Fourteenth Amendment of the United States Constitution; Article I, Section 16 of the Ohio Constitution) to be notified and heard before her right to possess property is taken from her by a public body which, after due notice, "hears before it condemns," "proceeds on inquiry" and "renders judgment only after trial."

In this case, plaintiff should have been given some notice and the right to be heard before the City Planning Commission determined that the area in question was blighted—thereby laying an alleged foundation for the City of Cleveland to exercise the right of eminent domain.

Also, the Courts should not permit plaintiff's property to be taken from her by the illegal use of U. S. C. § 1460.

It is further elementary that the plaintiff be not deprived of her right to seek redress to the courts (Article I, Section 16 of the Ohio Constitution, Ordinances of 1787), where, although permitted to file her plea in Court, she is prevented from introducing evidence in support of it.

It is, therefore, respectfully submitted that this appellant has properly invoked the appellate jurisdiction of this Court.

Respectfully submitted,

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In the Supreme Court of the United States

No. 353

OCTOBER TERM, 1962.

TERESA GRISANTI, *etc.*,
Plaintiff-Appellant,

vs.

THE CITY OF CLEVELAND, *et al.*,
Defendants-Appellees.

APPEAL FROM THE SUPREME COURT OF OHIO AND FROM THE COURT OF APPEALS OF CUYAHOGA COUNTY, OHIO.

APPENDIX TO JURISDICTIONAL STATEMENT.

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APPENDIX A.

Opinion of the Court of Common Pleas of Cuyahoga County, Ohio.

(December 8, 1961.)

DONALD F. LYBARGER, *J.*

This action has to do with the urban renewal project in downtown Cleveland popularly known as "Erieview." The plaintiff, Teresa Grisanti, individually and as a citizen and taxpayer of Cleveland brings suit against the City of Cleveland, the City Council and the City Planning Commission. Plaintiff prays to restrain the City from expending any public funds for the appropriation of premises she owns, or of any other real property in the area known as "Erieview-I Urban Renewal Project No. Ohio R. 36," (hereafter called Erieview-I Project) in the City of Cleveland. She seeks to restrain the City from continuing to prosecute its application to assess compensation as a result of the alleged appropriation of her property. She asks that any action heretofore taken by the defendants with respect to the attempted appropriation be declared null and void. She prays for judgment for costs and reasonable attorney fees and expenses.

REVIEW OF THE PLEADINGS.

Plaintiff states six causes of action as follows:

FIRST, she says she made demand on the Director of Law of the City to bring this action but he refused to do so. She has resided in the premises in question most of her life and specifically in the year 1960-61. She received notice from this court of an application by the City to assess compensation for her property sought to be appropriated for the rehabilitation of a blighted area, being a part of the Erieview-I Project.

Plaintiff says further that even before it owns her property, and without any dedication to a public use, the City has sought to sell the premises to private individuals for the development of private business.

She says that on November 25, 1960, the City Planning Commission purportedly adopted a plan for the Erieview-I Project and that the City Council approved it on December 12, 1960. She says the plan "practically provided for the abandonment of the general business and commercial area of downtown Cleveland * * *"; cut off direct means of access to the area included in the plan; and the defendants arbitrarily "elected to exercise a right which they do not possess to decide and designate what private buildings and businesses will be permitted to remain in said area and which shall be removed and demolished."

Plaintiff avers that the Revised Code of Ohio provides that no steps for the adoption of such a plan can be legally taken until the City Council has held not less than two public hearings thereon, after due notice to property owners affected. She says that no notice was given pursuant to this law, but that the only notice she had was one mailed November 11, 1960, from the City Planning Commission of a hearing to be held November 22, 1960, which notice she promptly protested.

In view of all that has just been recited plaintiff says that the short time of the notice was "unreasonable and arbitrary," and the purported adoption of said plan and ordinance constituted an arbitrary taking of her property without due process and "in violation of the Ohio and United States Constitutions."

SECOND, plaintiff says that hers is "an improved standard, commercial and residential structure;" that taking it along with other property is an invalid exercise of eminent domain since her continued ownership and use of her own

property "is not detrimental to the public safety or welfare," and that any finding of defendants to the contrary is arbitrary and an abuse of the powers of defendants.

THIRD, plaintiff contends that the City's action is an invalid and unconstitutional attempt to exercise eminent domain by "conduiting" (as plaintiff says) her private property to other private persons to be used for private business.

FOURTH, plaintiff avers that the Erieview area "is not an area blighted, deteriorated or detrimental to the public health, safety or welfare," and any such finding by the defendants is arbitrary, contrary to fact and an abuse of the powers of defendants.

FIFTH, she states that an attempted appropriation of her property and all other premises in the area is not "a taking of private property for a public use and is contrary to the Ohio and United States Constitutions," therefore the appropriation constitutes an illegal expenditure of public funds, and unless it is enjoined the City will suffer irreparable damage, for which there is no adequate remedy at law.

SIXTH, plaintiff says that the attempted appropriation of her property while other parcels in the area are not being taken is an unconstitutional exercise and abuse of defendants' powers.

The three defendants have filed their joint answer to plaintiff's petition and in it have made the following admissions: The identity of the defendants is as alleged; the plaintiff is owner of the real estate described by her, and is and was at all times mentioned a taxpayer of the City; demand was made on the Director of Law to bring this action but he failed and refused to do so; the plaintiff owned and resided in the premises in 1960-61 and for

many years; plaintiff received notice of the appropriation suit from this Court, and such action seeks to assess compensation by the City to plaintiff for her property for use in connection with renewal of a blighted area as part of the Erieview-I Project.

The defendants admit that the city advertised for proposals and bids to develop parcels in Erieview, already acquired or to be acquired, for utilization pursuant to the Erieview-I Project Plan, and that plaintiff's premises are included in the site with respect to which proposals and bids were sought. The defendants say that a bid was accepted, and unless restrained, the City will sell such land after its acquisition for use in accordance with the plan and pursuant to City ordinance.

The defendants further admit that on November 25, 1960, the City Planning Commission declared the Erieview area (including plaintiff's property) "to be a blighted, deteriorated and deteriorating area," and adopted a general neighborhood renewal plan, called "Erieview General Neighborhood Renewal Plan, Ohio R-31," and a plan for the specific renewal of a portion of such area, as heretofore mentioned and spoken of by the Court as the Erieview-I Project. The defendants further admit that on December 12, 1960, the City Council approved said plans, and on February 20, 1961, authorized a contract with the United States for aid in the completion of the project.

Defendants deny that their plans call for abandonment of the present general business and commercial area of downtown Cleveland, or the cutting off of access from portions of the city south of Euclid Avenue to the new Erieview area, but say that the plan will revitalize business, commercial and residential uses in what is now a deteriorating neighborhood

They admit that the plan, and actions taken pursuant to it, designate the general character and location of activities and structures to be permitted in the area, and that certain buildings and businesses will be allowed to remain while others will be demolished all in accordance with the plan. They say these designations and activities are in the public interest, health, safety and welfare.

The defendants admit that they did not follow provisions of the Revised Code of Ohio in adopting plans for Erieview, but aver that they acted pursuant to Chapter 51 of the Political Code, Part I of the Codified Ordinances of the City (which was adopted by the City under its home-rule powers). They deny that the Revised Code of Ohio is applicable.

As to notice the defendants admit that plaintiff was given notice on November 11, 1960, of a hearing to be held by the City Planning Commission on November 22, 1960, on the Erieview proposals. They state further that in addition notice was published on November 8 and 15, 1960, in the Cleveland Press and November 9 and 16 in the City Record. They deny that the shortness of the time of notice or any other aspect thereof was ever protested by the plaintiff, and they affirm that such notices were reasonable and in keeping with the City Ordinance.

As a second defense to plaintiff's first cause of action the defendants say that on November 22, 1960, the City Planning Commission, pursuant to the notices mentioned above, held a hearing on the proposed Erieview plans and afforded an opportunity to all interested persons to be heard; but "neither plaintiff or anyone representing plaintiff made any objection at said hearing."

Defendants allege the plans aforesaid were adopted by the City Planning Commission and the City Council